IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 21 OF 2004

Sajji Kumar,
S/o Pappu Kumar,
R/o Saji Bhavan,
P.O. Eramathoor,
Mannarvia Alleppey District,
(Presently lodged in Central
Aguada Jail, Aguada). ... Appellant

versus

State of Goa(Through Public
Prosecutor, High Court). ... Respondent

Mr. Menino Teles, Advocate for the Appellant.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CORAM : V. M. KANADE,J.

DATE : 10TH JUNE, 2005.

ORAL JUDGMENT

The appellant is challenging the Judgment and Order passed by the Additional Sessions Judge at Mapusa in Sessions Case No.15/2002. By the said Judgment and Order dated 25-3-2004 the Additional Sessions

Judge convicted the appellant for the commission of offence of rape which is punishable under Section 376(i)) of the Indian Penal Code and sentenced him to undergo Rigorous Imprisonment for a term of seven years and also to pay fine of Rs.5000/- in default to undergo Simple Imprisonment for a period of six months.

2. The prosecution case in brief is that the prosecutrix Ms. Hazel Smith who is a citizen of United Kingdom had come to Goa in the month of December, 2001. She was having her Travel Agency in United Kingdom and she had come to Goa for finding a new destination. Accordingly, she decided to stay here for a period of one month. The prosecution case is that one day prior to her departure to her native country she decided to take a massage at an Ayurvedic Massage Parlour as she was thoroughly exhausted after her stay in Goa. She, therefore, took a taxi and came on Tito's road to have a massage at the Ayurvedic Centre. Three persons were standing on the road when she made inquiries about the Ayurvedic Centre. She was informed by one of the persons that the Ayurvedic Centre was closed. He further represented to her that he was an Ayurvedic doctor and was in a position to give her an Ayurvedic massage. The prosecutrix relied on his representation and she was taken to a room. The accused bolted the door from inside and thereafter asked her to remove her clothes. Accordingly, she removed her clothes and was asked to lay down on a bedsheet which

was laid on the floor. The accused started giving her massage and after some time, he asked her to sleep on her back. Initially, she was embarassed because she was not wearing anything on her upper body. However, the accused assured her that he had given massage to several ladies and, therefore, she should not be embarassed but she should close her eyes and relax. The prosecution case is that with great hesitation the prosecutrix followed the directions given by the accused. It is alleged that thereafter the accused started massaging her leg and thigh and pubic portion at which point of time she got up. The accused however, pushed her down and committed rape on her. The prosecution case further held that the prosecutrix thereafter came out of the room, took a taxi and told her friends as to what had happened. They advised her that she should lodge a Police complaint. Accordingly, she lodged a Police complaint on the same day and she was accompanied by a friend to the Police Station. Thereafter, she was examined by the doctor. The Police thereafter went to the place where the offence had taken place and arrested the accused. A spot panchanama was prepared. The accused was also examined by the doctor and the blood samples and other samples of the prosecutrix were sent to the Chemical Analyser. The Investigating Officer recorded the statement of the witnesses and a charge-sheet was filed against the accused. Thereafter a charge was framed against the accused. He, however, pleaded not guilty to the charge. The prosecutrix attended the Court in March, 2003. However, since the

accused was not present initially she could not be examined and she had to return back to her native place. Thereafter, a letter was sent through the British Embassy stating therein that it was not possible for the prosecutrix to come to Goa on account of financial contraints and, therefore, in the letter it was stated that the case should be disposed of expeditiously. The trial Court, therefore, proceeded to record the evidence of the other witnesses on which reliance was placed. Since the prosecutrix could not be examined her statement which was recorded under Section 164 of the Code of Criminal Procedure by the Special Executive Magistrate was brought on record and the prosecution relied on the said statement and also the F.I.R. which was reduced into writing by the friend of the prosecutrix. The trial Court on the basis of available evidence on record convicted the accused for offence punishable under Section 376 of the Indian Penal Code and sentenced him to suffer Rigorous Imprisonment for seven years and also to pay fine of Rs.5000/- and in default to suffer further imprisonment for six months. The accused initially was arrested on the same day i.e. on 11-1-2002. He was later on released on bail on 25-3-2002. He thereafter continued to be in Jail.

3. I have heard the learned Counsel appearing on behalf of the appellant/accused and the learned Public Prosecutor appearing on behalf of the State at length. The learned Counsel appearing on behalf of the

appellant has taken me to the evidence adduced by the prosecution in the course of the trial and on the Judgment and Order of the trial Court. The learned Counsel submitted that the First Information Report was not proved by the prosecution because neither the prosecutrix nor the person who had reduced the F.I.R. into writing had been examined by the prosecution. He, therefore, submitted that though the F.I.R. had been executed after it was produced by the Investigating Officer the contents of the F.I.R. could not be read in evidence as the contents had not been proved. He has relied on a Judgment of the Bombay High Court reported in AIR 1983 Bombay and has also relied on other Judgments in support of the said submission. The learned Counsel thereafter submitted that assuming without admitting that the F.I.R. had been proved by the prosecution even then no reliance could be placed on the F.I.R. as it was not a substantive piece of evidence but could be only used for the purpose of corroboration or contradiction of the complainant and other witnesses examined by the prosecution. In support of the said submission he has also relied on Judgments of the Supreme Court and High Courts which will be dealt with at the subsequent stage. The learned Counsel thereafter submitted that the statement which was recorded by the Magistrate under Sectiuon 164 of the Code of Criminal Procedure also should not be relied upon by the prosecution as a substantive piece of evidence but at the highest the statement could have been used only for the purpose of contradiction and corroboration. He

submitted that since the prosecutrix was not examined by the prosecution her statement which was recorded under Section 164 of the Code of Criminal Procedure, therefore, could not be of any assistance to the prosecution. The learned Counsel submitted that the non examination of the prosecutrix in the present case was an irregularity which could not be cured and which was fatal to the prosecution case. He submitted that the prosecutrix had appeared in the Court on 2 to 3 dates however on the actual date she chose to remain absent. He submitted that if the prosecutrix had been examined the learned Counsel for the accused could have cross-examined her on a number of aspects and, therefore, by not examining the prosecutrix serious prejudice was caused to the accused. He submitted that on this ground alone the entire prosecution case was liable to be dismissed. He submitted that this Court should draw an adverse inference on account of the non examination of the prosecutrix. The learned Counsel thereafter submitted that P.W.6, S. D. Sapeco, was a doctor who examined the prosecutrix as also the accused found that there was no injuries on the person of the accused or the prosecutrix. He submitted that assuming that the incident in question as alleged by the prosecution had taken place the absence of injuries indicate that there was absolutely no resistence when the said incident happened and this indicated that the prosecutrix was a consenting party to the incident which had taken place. He submitted that the prosecutrix was an able healthy woman of 35 years of age and could

have raised a hue and cry and could have resisted the accused. He submitted that the medical evidence, therefore, in fact did not support the prosecution case. He further submitted that the doctor could not give the exact time when the sexual intercourse had taken place. He submitted that it had come in the evidence that the prosecutrix had a boy friend named Daniel and that it had come in the evidence that Daniel had thrown her out of his room on 13-1-2002. He submitted that even if it is held that there was a sexual intercourse it could not be said that accused had committed the said act. He thereafter submitted that even if the F.I.R. is read in its totality it did not constitute an offence punishable under Section 376. It is submitted that in the F.I.R. the complainant has not stated that either she was raped or that the accused had inserted his penis in her private part. He submitted that in the F.I.R. it is recorded that while the massage was going on the complainant felt that the accused was licking her private part and when she got up he pushed her down and penetrated her. He submitted that thus even if the F.I.R. is read as a whole it could not be said that he had penetrated his penis in her private part and, therefore, no offence punishable under Section 376 was made out. The learned Counsel appearing on behalf of the appellant thereafter submitted that several persons who were named by the complainant in the statement under Section 164 of the Code of Criminal Procedure were not examined by the prosecution and, therefore, adverse inference should be drawn against the

prosecution. He thereafter submitted that all the witnesses who are examined by the prosecution are pliable witnesses inasmuch as all these witnesses are carrying on business and are practically at the mercy of the Police Officers. He thereafter submitted that even otherwise the proseution had not been in a position to establish that the said offence had taken place as there were several defects in the manner in which spot panchanama was taken. No arrest panchanama was prepared by the prosecution. He pointed out to the several lapses in the investigation made by the Investigating Officer. The learned Counsel appearing on behalf of the appellant further submitted that the Test Identification Parade could not be relied upon firstly because all the arrangements were made by the Investigating Officer though the guidelines prepared by the High Court clearly indicated that the Special Executive Magistrate is required to take every precaution to ensure that the Test Identification Parade is held in an independent manner and there is no possibility of any interference by the Police Officer. He further submitted that the Test Identification Parade was vitiated by the fact that the prosecutrix had seen the accused before he was arrested. He submitted that this fact has been stated by P.W.4, Joanita Fernandes, who in her evidence has stated that she along with the prosecutrix and the Police had gone to the place where the accused stayed and they noticed the accused there and thereafter he was arrested by the Police. He submitted that, therefore, it was not necessary to hold the Test Identification Parade and the said

evidence was, therefore, liable to be discarded. He thereafter invited my attention to the evidence of P.W.5, Alerio Lobo and P.W.8, Liliya Lobo and pointed out the various infirmities in their evidence and submitted that their evidence did not support the prosecution case and also was not of any assistance to come to the conclusion that the accused had committed the said offence. The learned Counsel appearing on behalf of the appellant relied on a number of Judgments of the Supreme Court and the High Court in support of these submissions.

4. The learned Public Prosecutor appearing on behalf of the State submitted that non examination of the prosecutrix was not fatal to the prosecution case. He submitted that the evidence which was brought on record clearly indicated that the offence in question had taken place and that the accused was the perpetrator of the said crime. He relied on a Judgment of the Supreme Court reported in **State of Karnataka** v. **Mahabaleshwar G. Naik** (1992 Cri. L. J. page 3786) in support of the said submission. He submitted that though the F.I.R. or the statement which is recorded under Section 164 of the Code of Criminal Procedure cannot be treated as a substantive piece of evidence yet it could be relied upon for the purpose of establishing the fact that the incident in question had taken place and the prosecutrix had promptly reported the matter to the Police at 11.30 p.m. When the incident had taken place between 8.30 and 9.30 on

the same date, the learned Public Prosecutor submitted that the promptness with which the complaint was lodged by the complainant indicated that the incident in question had taken place and, therefore, to that extent reliance could be placed on the first information report and the statement which was recorded under Section 164. He further submitted that the medical evidence clearly indicated that there was some injury to the private part of the prosecutrix as there was a slight abrasion near her fouchette and there was a swelling in her private part. The learned Public Prosecutor has taken me to the evidence of the various witnesses for examining on behalf of the proseution. He submitted that on the evidence of P.W.4, Joanita Fernandes, it could be seen that she had given a room to the accused on rent and he was residing in the said room. She has further stated in her evidence that she had seen the accused in the company of a foreigner. Further, he invited my attention to the evidence of P.W.5, Alerio Lobo, who has stated that he had seen a foreigner crying in his compound and that his servant Karuna told him that the foreigner had informed her that she had been raped. Further, P.W.8, Liliya Lobo, according to the learned Public Prosecutor also corroborated the case of the prosecutrix. He submitted that though it is held that the Test Identification Parade was vitiated on account of arrangements being made by the Investigating Officer yet even otherwise the prosecutrix had identified the accused when she had gone along with P.W.4, Joanita Fernandes along with the Police Officer. He, therefore,

submitted that any lacuna in holding the identification parade did not demolish the fact that the prosecutrix had identified the accused. He further submitted that though there may be some lapses on the part of the prosecution on that count benefit should not be given to the accused. In support of the said submission, he relied on a Judgment of the Supreme Court reported in AIR 1988 SC 2514 and in the case of Vishwasvaran v. State represented by SDM reported in 2003. He submitted that the prosecutrix had attended the Court and had come on her own from her native country and had attended the Court on 3 dates and thereafter she had expressed her inability to attend the Court on account of financial constraints. He further submitted that this showed the conduct of the prosecutrix in pursuing the case on account of injustice which was done to her. He further submitted that unless there is a strong motive for the prosecutrix to falsely implicate the accused the sole testimony of the prosecutrix is sufficient to convict the accused. In support of the said submission, he relied on a Judgment reported in (2004) 6 Supreme 596. He further submitted that it could not be said that the prosecutrix had deliberately remained absent but was unable to attend on account of financial constraints. He invited my attention to the various findings given by the trial Court and urged that the findings of the trial Court may be confirmed by this Court.

5. In the present case, the prosecutrix unfortunately has not been examined by the prosecution. In my view, the trial Court ought to have recorded her examination-in-chief when she had attended the Court on more than one occasion. It was the duty of the prosecution to have requested the trial Court to record the statement of the prosecutrix. In my view, the trial Court ought not to have adjourned the case merely because the accused was not present in the Court. The accused admittedly was represented by an Advocate. The prosecutrix had travelled all the way from England to Goa for the purpose of giving evidence after having spent considerable time and money as the charge which was levelled against the accused was very serious. Instead of recording the evidence of the prosecutrix the trial Court has adjourned the case at least on 3 dates. Thereafter, a letter was sent by the British Embassy which is at Exh.94, page 196 of the Paper Book in which it has been mentioned that the prosecutrix was unable to come to the Court again on account of financial constraints and because of emotional distress which was caused to her. Since a letter has been sent by the British Embassy stating the reason why the prosecutrix is not in a position to attend the Court, it would not be possible to pass an Order under Section 391 of the Code of Criminal Procedure for the purpose of recording additional evidence and no useful purpose would be served by permitting the prosecution to lead evidence in the High Court or by remanding the case to the trial Court for the purpose of recording the

evidence of the prosecutrix as she has declined to come to the Court. Therefore, it will have to be seen whether the prosecution has established its case on the basis of the other evidence which has been brought on record. The prosecution has in all examined 10 witnesses. P.W.1, Vinayak Alornekar, is a Special Executive Magistrate who conducted the Test Identification Parade. P.W.2, Marcelino A. Fernandes, is a panch witness who prepared the spot panchanama. P.W.3, Krishna V. Shetgaonkar, was attached to the C.I.D. Branch, Panaji as P.S.I. and he has sent the samples which were taken from the accused and the prosecutrix to the Chemical Analyser. P.W.4, Joanita Fernandes is the landlady of the accused who had given one room to the accused and has stated that the accused was using the room as a massage room. She has stated that she was running a restaurant along with a bar known as "Seby" in the front portion of her house. P.W.5, Alerio Lobo, was carrying on a business of a small hotel and he has been examined by the prosecution in order to brief that the prosecutrix was found crying in the compound on the said date of the incident. The prosecution has also examined his wife P.W.8, Liliya Lobo. The prosecution has further examined P.W.6, Dr. Silvano Dias Sapeco. P.W.6, Dr. Sapeco examined the prosecutrix and also the accused on the next day. On 12-1-2002 at 3.10 a.m. he examined the prosecutrix and on 12-1-2002 he examined the accused. The prosecution thereafter examined P.W.7, Gaurish Mapari, who was attached to the C.I.D. Crime Branch as a

Scientific Assistant who forwarded the sealed exhibits and the report. The prosecution then examined P.W.9, Deu Banaulikar who is the Officer in charge of the Police Station and who carried out the investigation of the entire offence and lastly, the prosecution examined P.W.10, Reginald Remedios who is a photographer who had taken photographs of the scene of offence when the panchanama of the scene of offence was in progress. The Investigating Officer, P.W.9, Banaulikar, in his evidence has produced the F.I.R. which was recorded in the Police Station. He has stated that the prosecutrix was frightened and stunned and was not in a position to write the F.I.R. and, therefore, her friend Esmath had reduced the F.I.R. into writing and the signature of the complainant was obtained. The Investigating Officer has been cross-examined at length on this point and an attempt is made to show that in fact the F.I.R. which was produced by the prosecution was subsequently prepared. In my view, the Investigating Officer has given cogent reasons in his examination-in-chief and cross-examination and has explained as to why the complainant was not in a position to write the F.I.R. The F.I.R., therefore, in my view, has been properly proved by the Investigating Officer and has been exhibited by the trial Court. The learned Counsel appearing on behalf of the appellant has relied upon a number of Judgments in support of his submission. Since the complainant has not been examined the contents of the F.I.R. cannot be relied upon and that the F.I.R. should be used only for the purpose of

corroboration and contradiction. He has relied on a Judgment of the High Court reported in the case of **Om Prakash and another v. United Trust of India and others**(1983 Bombay page 1). He has also relied upon a Judgment of the Supreme Court in the case of Harking v. State of Punjab (1997 Cri. L. J 3954). He has further relied upon a Judgment of the Supreme Court in the case of George v. State of Kerala and another(1998 Cri. L. J. 2034. He has also relied upon a Judgment of the Supreme Court in Madhu v. State of Bihar(AIR 1995 SC 1467).

6. There cannot be any dispute regarding the ratio laid down in the said Judgments. It is a well settled law that the F.I.R. by itself cannot be used as a substantive piece of evidence and it can only be used as a contradiction or corroboration thereof. In the present case, the complainant has not stepped into the witness box and, therefore, even otherwise it will not be possible to rely on the said F.I.R. as a substantial piece of evidence. Even otherwise, the Supreme Court in the case reported in 1998 2034 has observed that the F.I.R. even otherwise cannot be used as a substantive piece of evidence to discredit the testimony of other witnesses. However, the F.I.R. can be used only for the limited extent for the purpose of establishing the fact that the F.I.R. was lodged at 11.30 on 11-1-2002 immediately after the alleged offence had taken place and, therefore, there is no reason to disbelieve the testimony of the Investigating Officer that the

prosecutrix had personally come to the Police Station along with her friend and the F.I.R. was reduced into writing by her friend.

7. The second submission which is made by the learned Counsel appearing on behalf of the appellant is that the statement of the prosecutrix which was recorded under Sectrion 164 of the Code of Criminal Procedure cannot be used as a substantive evidence also in my view has to be accepted. It is a settled position that a statement under Section 164 can be used only for the purpose of corroboration and contradiction and cannot be used as a substantive piece of evidence. In the case reported in **Audumbar Digambar Jagdane and another** v. **State of Maharashtra** (1999 Cri. L. L. 1936) a Division Bench of this Court has observed in para 12 as under:-

> ""In our opinion once Narayan has not supported the prosecution, the statement given under 164, even if proved, can never be accepted as substantive evidence. In that behalf reference to the decision of the Privy Council reported in AIR 1946 PC 38: (1946(47) Cri.L.J. 336) is extremely fruitful. The Committee of the Privy Council speaking through Sir John Beaumont, J. in the aforesaid decision on page 41(of AIR): (at p.338 of Cri.L.J.) of the report has observed as under:
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> "..... The learned Judges discussed in great detail the statements made by Haliman and Mahabir under S. 164 and gave reasons for accepting

> the facts or most of the facts, deposed to in those statements, in preference to the evidence given by the witnesses in Court, which in no way helped the prosecution. This was an improper use of such statements. A statement under S. 164 can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false. But that does not establish that what he stated out of Court under S. 164 is true".

8. The Supreme Court also in a number of cases has time and again held that a statement which is recorded under Section 164 can be used only for the purpose of corroboration and contradiction and not as a substantive piece of evidence. This statement however, has been recorded by the Special Executive Magistrate P.W.1, Vinayak Alornekar, who has recorded the statement of the prosecutrix and this document, therefore, has been brought on record by the prosecution in order to further establish that the prosecutrix had made a statement on oath before the Special Executive Magistrate. Thus, though this statement which is recorded under Section 164 cannot be used as a substantive piece of evidence yet it can be relied upon only for the purpose of establishing a fact that the prosecutrix had made a statement on oath in respect of her complaint before the Special Executive Magistrate, P.W.1, Alornekar.

9. From the evidence of P.W.4, Joanita Fernandes, it can be seen that she has stated in her evidence that she had given a room to the accused in her house in December, 2001. She has stated that she knew the accused since he was residing in a room in her house at Calangute. She has further stated that on 23-12-2001, the accused approached her and asked her for a room and that she had declined to give him a room on that day. However, on the next day, the accused again begged her to give a room and, therefore, she agreed to let out a room to the accused. She stated that the accused had started residing in the room from 24-12-2001. She has stated that the accused was using the room as a massage room. She has further deposed that she was running a restaurant cum bar known as "Seby" in the front portion of the house while the room given to the accused was towards the rear side of the house. She has stated that the room which was given to the accused was a self-contained room with toilet and bath facility. She has further deposed that on 11-1-2002 at about 8 p.m. while the accused was sitting in the restaurant one taxi driver approached him and took him towards the room and she has further stated that after about half an hour she saw the accused returned to his room along with a foreigner lady. She has further stated that at 9 p.m. the accused paid her Rs.500/-. Further she has stated that at midnight at about 1 a.m. the Police came to her house along with the same foreigner lady whom she had seen going along with the accused to his room and at that time the accused was present along with the

Police and the lady. She has further stated that she learnt subsequently that the accused had raped the foreigner. Though, this witness has been cross-examined at length essentially her testimony regarding the presence of the accused along with the foreigner has not been shaken. It is no doubt true that the Investigating Officer, P.W.9, Deu Banaulikar, in his evidence has stated that the complainant was not present when the accused was arrested. However, there is no reason to disbelieve P.W.4, Joanita Fernandes. From the evidence of P.W.4, Joanita Fernandes, it is established that the accused was given a room on rent and that he was with the complainant in the room from 8 p.m. and that he was using the said room as a massage room and thereafter the accused was arrested in her presence and at that time the complainant was also present. It is no doubt true that in the cross-examination she has stated that she would not be in a position to identify the lady since she did not see her everyday. Though, much emphasis is led on behalf of the appellant on this admission given by P.W.4, Joanita Fernandes, in my view, this would not totally make her evidence unreliable. On the contrary, it clearly establishes that the accused had taken the complainant to his room and was with her inside the room for some time and thereafter the Police had come and had arrested him and at that time the lady was present. P.W.4, Joanita Fernandes, on the contrary is a natural witness who has confessed that she had no occasion to observe the complainant in detail because she has merely seen the accused take the

prosecutrix to his room from a distance and thereafter at 1 o'clock at night she had seen the complainant along with the Police. The evidence of P.W.4, Joanita Fernandes, has been corroborated by P.W.5, Alerio Lobo and P.W.8, Liliya Lobo who have both stated that a foreigner lady was crying in his compound behind his house. He has stated in his evidence that he was running hotel business and had a small hotel under the name and style "Alidia Beach Cottages" at Sauntawaddo, Calangute and that his house and hotel business was adjacent to each other and his hotel was behind his house. He has stated that on 11-1-2002 at about 9.30 p.m. he heard a lady crying and at about the same time his maid servnt Karuna told him that a foreigner lady was crying in his compound behind his house and that he asked the lady why she was crying and she told him that she had been raped on Tito's road. She further told that she wanted to call her father in U.K. and tried to contact them on her mobile phone. However, she was not successful in contacting them. This witness has further stated that the lady had informed him that she knew some friends from Baga. He, therefore, took the lady along with one Michael in his car and drove towards Baga. When they went to Baga they found that the house of her friend was closed. Thereafter, she went to Calangute, entered the building and came out with an Indian girl who requested him to take the foreigner to the doctor. He however, could not go along with them but told the girl whether he could arrange for a taxi. This witness also has been cross-examined by the learned

Counsel appearing on behalf of the accused and in the cross-examination this witness has admitted that he had not seen the lady properly since it was dark. The learned Counsel appearing on behalf of the appellant had laid much emphasis on this admission and has stated that this witness is a got up witness. He has submitted that P.W.4, Joanita Fernandes, P.W.5, Alerio Lobo and P.W.8, Liliya Lobo were very much under the control of the Police as they were carrying on hotel and restaurant business and constantly required the help of Police Officers. He submitted that the persons who are named by this witness, namely Michael and the Indian girl who had allegedly taken the complainant to the doctor also have not been examined by the prosecution. It was submitted that even their statements were not recorded by the prosecution. He submitted that if this witness had been told by the complainant that rape had taken place he would immediately ask them to come to the Police or would have informed the Police himself. It is no doubt true that the prosecution has failed to examine Michael or the Indian girl who had allegedly travelled with the complainant to various places and had taken her to a doctor. Even the doctor has also not been examined by the prosecution. Yet in my view, the entire testimony of this witness cannot be discarded because the investigation has not been carried out in a proper manner. The evidence of this witness establishes that one foreigner lady was crying in the compound and that she had informed him that she had been raped on Tito's road. Though, it is true that the

complainant had not stated that she had been raped in the massage parlour but clearly stated that she had been raped on Tito's road, however, in my view, that would be a natural conduct on the part of the prosecutrix and she would not disclose the details to a stranger particularly when she was in the state of shock and which fact has been stated also by the Investigating Officer. Thus, in my view, the evidence of P.W.5, Alerio Lobo, establishes this fact that the complainant who was identified by P.W.5, Alerio Lobo, in the Court was crying in the compound of his house immediately after the incident which had taken place between 9.30 p.m. in the room where the accused had taken her for the purpose of administering massage. P.W.8, Liliya Lobo, is the wife of P.W.5, Alerio Lobo, who also in her evidence has stated that she met the prosecutrix in the compound outside her house. She has stated that she knew her since she had stayed in her hotel in the month of November or December, 2001. She has further stated that the prosecutrix was crying and, therefore, she asked her what had happened. The prosecutrix, however, did not immediately answer her question but continued crying and, therefore, she offered her coffee and took her to the restaurant. Thereafter, one of her room boys had told her that the prosecutrix wanted to see a room and, therefore, he had shown her a room. He informed her that the prosecutrix had left her luggage in the restaurant and had left. Further, she has stated that at about 21.30 hours her husband came home and told her that there was a lady crying in the compound. She,

therefore, went out and saw that it was the prosecutrix. She has further stated that the prosecutrix was hysterical and had informed her that she was raped. P.W.8, Liliya Lobo, has further stated that she offered to help her and inquired whether she wanted to go to the Police Station. She has further stated that she offered to take her to the doctor but the prosecutrix Ms. Hazel informed her that she wanted to go to her boyfriend named Daniel and, therefore, her husband along with one Michelle who was one of their guests went in search of Daniel and her husband returned at about 10 p.m. In the cross-examination, P.W.8, Liliya Lobo, has stated that the prosecutrix had told her that her friend Daniel had kicked her out and she did not know what to do. Further, in the cross-examination, she has admitted that she did not recall having told to the Police that Mahavir one of her room boys had told her that the victim had left her luggage in the restaurant and had gone away. Further, in the cross-examination, P.W.8, Liliya Lobo, has admitted that she did not have any record to show that the prosecutrix had stayed in her hotel in November or December, 2001 as she had stayed only for one night with one of their guests. She further admitted that she will not be able to state the name of the guest with whom she had stayed that night for want of records. Considering the evidence of P.W.8, Liliya Lobo, it is seen that she has categorically stated that she had seen the prosecutrix in her compound and was crying and was hyterical and on being asked she informed that she had been raped on Tito's road in Sauntawaddo,

Calangute. Thus, in the evidence of P.W.4, Joanita Fernandes, P.W.5, Alerio Lobo and P.W.8, Liliya Lobo, it can be seen that P.W.4, Joanita Fernandes, has stated that the prosecutrix had gone along with the Accused to his room. P.W.5, Alerio Lobo, has stated that he had seen her crying in his compound. This fact is corroborated by P.W.8, Liliya Lobo, who identified the prosecutrix since she had stayed in one of their rooms in November or December, 2001. It is no doubt true that in the cross-examination, she had candidly admitted that she did not have the record but that by itself would not be sufficient to discard her testimony regarding the identification of the prosecutrix as there is no reason why she would falsely allege that she knew the prosecutrix.

10.. Yet, unfortunately since the prosecutrix has not been examined, it would be difficult to come to the conclusion that she had been raped by the Accused. It is no doubt true that the doctor who had examined the prosecutrix has stated that the prosecutrix had sexual intercourse before she was examined and that the exact time could not be established. Therefore, even if the evidence of the doctor is adduced, it would be difficult to establish whether the prosecutrix was subjected to forcible intercourse in the room of the Accused or at any other time before she entered the room of the Accused. Particularly if the evidence of P.W.8, Liliya Lobo, is taken into consideration wherein she has admitted in the cross-examination that the

prosecutrix had informed her that her boyfriend Daniel had kicked her out and she had nowhere to go. In my view, the F.I.R. cannot be taken into consideration as a substantive piece of evidence and it can be used only for the purpose of corroborating or contradicting the evidence of the Complainant. Similarly, the statement of the prosecutrix which is recorded under Section 164 of the Criminal Procedure Code also cannot be relied upon as a substantive piece of evidence but at the highest it can be used for corroborating or contradicting the evidence of the Complainant. In the present case, since the Complainant has not been examined by the prosecution, no reliance can be placed on the said two documents. However, on the basis of the said two documents at the highest, it can be said that it establishes the fact that it was recorded at the instance of the prosecutrix and further that the prosecutrix had immediately after the incident had taken place lodged the complaint within one hour and had also recorded her statement before the Special Executive Magistrate on oath under Section 164 of the Criminal Procedure Code. The submission made by the learned Counsel appearing on behalf of the Appellant that the non examination of the prosecutrix was fatal to the prosecution case cannot be accepted. In my view, if there is sufficient evidence on record other than the evidence of the prosecutrix which would indicate that an offence had taken place, it would be open for the Court to take into consideration the evidence given by the other witnesses to come to a conclusion whether an

offence under Section 376 or under any other provisions of the Act had been committed or not. I am fortified in my view by the Judgment of the Supreme Court in the case of **State of Karnataka** v. **Mahableshwar Gourya Naik** reported in (1992 Cri.L.J. 3786) in this case also the prosecutrix was not examined by the prosecution. However, the prosecution had examined other witnesses. In the said case, the Supreme Court, however, observed that merely because the prosecutrix could not be examined that would not be a ground for acquitting the Accused if there is evidence otherwise available proving the criminal act of the Accused concerned.

11. Thus, it will have to be seen whether the offence of rape by the Accused has been proved by the prosecution against the Accused after appreciating the evidence that is available on record. In my view, it is difficult to arrive at a conclusion that the prosecutrix was raped by the Accused in the room where she was taken by the Accused. According to me, from the evidence on record, it has been established that the prosecutrix and the Accused had gone to his room at about 8 to 8.30 in the evening and thereafter the prosecutrix was seen by P.W.5, Alerio Lobo and P.W.8, Liliya Lobo in their hotel compound in a hysterical condition and she had informed them that she had been raped on Tito's road. P.W.4, Joanita Fernandes, has also stated that the prosecutrix had come along with the

Police Inspector later that night and had identified the Accused before he was arrested. However, this is not sufficient to arrive at a conclusion that an offence of rape had been committed. According to the Investigating Officer, a F.I.R. was lodged at about 9.30 and at that time, the prosecutrix was not in a position to write her own statement and, therefore, it was written by her friend. The doctor who has been examined by the prosecution has categorically stated that there was no injury on the person of the Accused or on his private part nor there were any injuries on the person of the prosecutrix. Though, he has stated that there was evidence that the prosecutrix had a sexual intercourse before her examination, the exact time when the intercourse had taken place has not been mentioned. The Chemical Analyser's Report does not support the prosecution about the theory of sexual intercourse since the report indicates that no semen was found on the clothes of the prosecutrix and there was no evidence to indicate that the Accused had sexual intercourse with the prosecutrix. Therefore, in my view, the prosecution has failed in establishing that the Accused had raped the prosecutrix and had committed an offence punishable under Section 376 of the Indian Penal Code. The Accused, therefore, is acquitted of the offence punishable under Section 376 of the Indian Penal Code.

12. The next question which falls for consideration is whether it has

been proved by the prosecution on the basis of the evidence which is available on record that the Accused had committed any other offence punishable under the provisions of the Indian Penal Code. In the present case, the prosecution case is that the prosecutrix before leaving Goa wanted to have an Ayurvedic massage and with that specific intention in mind she had gone on Tito's road to have a massage at the Ayurvedic Centre. However, she found that the said Centre was closed when she made inquires with the Accused who was standing on the road along with two other persons. The Accused represented to the prosecutrix that he was an Ayurvedic doctor and that he could give an Ayurvedic massage to her. Relying on the representation made by the Accused she went to the room and she was asked to remove all her clothes. She was told that it was essential for the purpose of giving her an Ayurvedic massage. Thereafter, the Accused gave a massage to the prosecutrix. During the course of the massage, the Accused told the prosecutrix to close her eyes and relax. Accordingly, the prosecutrix closed her eyes and after some time the Accused removed the towel from her waist and then committed rape on her. In my view, though, the offence of rape is not proved by the prosecution yet it has been established that the Accused had taken the prosecutrix to his room for the purpose of giving a massage. The spot panchanama clearly shows that there was a mattress lying on the floor. There were a few bottles on the table in the room and there was a blue underwear lying on the floor.

The room had an attached toilet. This clearly indicates that the Accused had taken the prosecutrix to the room for giving massage and during the massage had committed an act by which the prosecutrix was offended and had acted promptly in filing a complaint to the Police Station. She had thereafter made a statement on oath before the Special Executive Magistrate under Section 164 of the Code of Criminal Procedure. She had also attended the Court on three dates for the purpose of giving her attendance. However, since she was unable to attend the Court every time by spending money from her pocket and due to financial constraints she could not come from her native country. Thereafter, she could not remain present. Thus, from the evidence on record, in my view, the prosecution has established that the Accused had committed an offence punishable under Section 354 of the Indian Penal Code and the Accused had outraged the modesty of the prosecutrix by committing such acts while giving massage to her. The prosecution, therefore, in my view, has proved beyond reasonable doubt that the Accused has committed an offence punishable under Section 354 of the Indian Penal Code and is sentenced to suffer Rigorous Imprisonment for 2 years.

13. It is essential in my view to express my dissatisfaction on the manner in which the investigation has been carried out. In my view, it was the duty of the Investigating Officer to have recorded the statement of the

witnesses who have been named by P.W.4, Joanita Fernandes and P.W.8, Liliya Lobo. The Investigating Officer in my view, has acted in a careless manner and has not bothered to record the statements of these witnesses. P.W.4, Joanita Fernandes, has stated that the prosecutrix was taken to a doctor by her Indian friend. The Investigating Officer has not bothered to record the statement of this doctor who had examined the prosecutrix. Similarly, the F.I.R. was written by the friend of the prosecutrix. Though, her statement was recorded by the Investigating Officer, she has not been examined as a witness. No steps have been taken to locate the friend of the prosecutrix named Daniel. Similarly, the identification parade also seems to have been supervised by the Investigating Officer which is evident from the statement of the Special Executive Magistrate, Vinayak Alornekar, P.W.1. Secondly, it must also be stated here that the trial Court ought to have recorded the statement of the prosecutrix when she had attended the Court on three dates. There was no reason to adjourn the case when the prosecutrix had come specifically for the purpose of giving deposition in the Court from United Kingdom at her own expense. Merely because the Accused was not present in the Court the case was adjourned on the three dates when the prosecutrix was present in the Court for the purpose of giving evidence. The learned Counsel of the Accused was present in the Court and he could have cross-examined the prosecutrix. Therefore, the presence of the Accused was not required and no prejudice could have been

caused to the Accused if the prosecutrix had been examined in his absence. If the evidence of the prosecutrix had come on record, it would have been possible to appreciate her evidence in a proper perspective. The Accused would also have got an opportunity to cross-examine her.

14. The trial Court has in my view erred in holding that the prosecution had proved its case beyond reasonable doubt. The trial Court has given a finding that there was an abrasion on the penis of the Accused and that the Accused could not offer any explanation. The trial Court has given an incorrect finding as the evidence on record clearly shows that there was no injury on the private part of the Accused. The doctor who has examined the Accused has clearly stated in his evidence that there were no injuries on the person of the Accused or his private part.

15. The trial Court has placed reliance on the case of **State of Karnataka** v. **Mahableshwar Gourya Naik**(supra). In my view, in the said case there was an evidence of an eye witness who had seen the Accused with the prosecutrix soon after the offence was committed and the Supreme Court had relied on the said evidence of the eye witness for convicting the Accused for the offence punishable under Section 376 though, the prosecutrix was not examined in the said case. In the present case, unfortunately there is no other eye witness who has seen the Accused

committing an offence under Section 376 of the Indian Penal Code nor there is other medical evidence or evidence of the Chemical Analyser to prove that the Accused had sexual intercourse with the prosecutrix. It is a settled position in law that a moral conviction regarding the guilt of an individual has no place in criminal jurisprudence. The Court has to give a finding from the legal evidence placed before it by the prosecution and by the defence and is not to be influenced by the gravity of the crime. In a case of this nature, one may be convinced morally that the Accused was the author of the crime. But moral conviction cannot lead to a legal conviction of an Accused. An order of conviction can be based only on legal evidence and not on hypothetical propositions or unwarranted inferences. The trial Court, therefore, in my view, has acted on surmises and unwarranted inferences and the conviction of the Accused under Section 376 of the trial Court is not based on legal evidence and the finding of the trial Court is, therefore, set aside.

16. In the result, the appeal is partly allowed. The conviction of the appellant under Section 376 of the Indian Penal Code is set aside. The appellant is acquitted of the offence punishable under Section 376 of the Indian Penal Code. The appellant however, is convicted for the offence punishable under Section 354 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for a period of 2 years. The period which the

appellant has already undergone shall be set off towards the final sentence and if he has already undergone sentence of 2 years he should be released forthwith. However, if he has not undergone the period of 2 years he shall complete the said sentence. With this modification the appeal is partly allowed.

V. M. KANADE, J.

RD.